IN THE

Supreme Court of the United States

1974 TERM

No. 74-5968

JOHN A. GEDERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF PETITIONER

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TABLE OF CONTENTS

	Page
REPORTS OF OPINIONS BELOW	2
GROUNDS FOR INVOKING JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED	2
CASE CITATIONS	3
QUESTION PRESENTED FOR REVIEW	3
STATEMENT OF THE CASE	3
ARGUMENT	5
CONCLUSION AND PRAYER	14

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BRIEF OF PETITIONER

Petitioner, John A. Geders, through his undersigned attorneys, respectfully submits his Brief to this Honorable Court, pursuant to Rule 40, Revised Rules of the Supreme Court of the United States, and would show unto the Court the following:

Reports Of Opinions Below

United States of America v. Michael J. Fink and John A. Geders, ____ F. 2d ____ (DC, MD of Fla. 1973); Trial Case No. 73-69-Cr-T-K

Fink and Geders v. United States of America, 502 F.2d 1 (5th Cir. 1974)

Grounds For Invoking Jurisdiction

The jurisdiction of this Honorable Court is invoked under:

18 U.S.C., Section 371
21 U.S.C., Section 841
21 U.S.C., Section 952
21 U.S.C., Section 955
21 U.S.C., Section 960
28 U.S.C., Section 1254(1)

There is apparently a direct conflict between the United States Courts of Appeals for the Second and Third Circuits regarding the narrow question presented for review herein with the United States Court of Appeals for the Fifth Circuit adopting (following) the law and rationale of the Second District in the case sub judice.

Constitutional Provision Involved

Sixth Amendment to the United States Constitution which guarantees to a defendant in a Federal criminal proceeding the right to have assistance of counsel for his defense.

Case Citations

Chapman v. State of California, 386 U.S. 125, 87 S.Ct. 824 (1967)

Fink and *Geders v. United States,* 502 F.2d 1 (5th Cir. 1974)

Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L. Ed. 680 (1942)

United States v. Leighton, 386 F. 2d 822 (2nd Cir. 1967)

United States v. Venuto, 182 F. 2d 519 (3rd Cir. 1950)

Question Presented For Review

WHETHER THE TRIAL COURT'S ORDER PROHIBITING DEFENDANT GEDERS AND HIS ATTORNEY FROM CONFERRING WITH EACH OTHER DURING A SIXTEEN HOUR PERIOD AT A CRUCIAL STAGE OF THE TRIAL DEPRIVED DEFENDANT GEDERS OF HIS SIXTH AMENDMENT RIGHT TO COUNSEL?

Statement of the Case

Petitioner, John A. Geders, was convicted in 1973 in United States District Court, Middle District of Florida, Tampa Division on three counts of a Grand Jury indictment charging him with:

(a) Conspiring to import approximately one thousand pounds of marihuana into the United States, in violation of 21 U.S.C., Section 952(a) and 18 U.S.C., Section 371;

(b) Illegal importation of said marihuana into the United States, in violation of 21 U.S.C., Section 952;

(c) Possession of marihuana in violation of 21 U.S.C., Section 841(a)(1).

Order, judgment and sentence were duly entered and imposed in this cause by the Honorable Ben Krentzman, Senior Judge of the United States District Court, Middle District of Florida, Tampa Division, in Case No. 73-69-Cr-T-K.

Petitioner thereafter timely filed his appeal and the aforesaid Judgment of Convictions was taken to the United States Court of Appeals for the Fifth Circuit in Appellate Case No. 73-3966. On October 7, 1974 the appellate court entered its judgment and opinion affirming the Judgment of Convictions of the District Court. (See Page ____ of Single Appendix re: the 5th Circuit Opinion.)

Petitioner thereafter unsuccessfully petitioned the appellate court for a re-hearing with that court entering its Order Denying Petition For Re-Hearing on December 6, 1974.

Subsequently, following Petitioner Geders' Motion, the appellate court recalled and stayed its Judgment previously issued as mandate pending the timely filing and disposition of a Petition For Writ of Certiorari to this Honorable Court and further ordered reinstatement of Petitioner's earlier appeal bond.

Following Application by Petitioner, this Honorable Court entered its Order on January 9, 1975 extending time to file his Petition For Writ of Certiorari up to and including February 4, 1975.

On April 21, 1975, following the timely filing of his Petition For Writ of Certiorari this Honorable Court granted review of his convictions by writ of certiorari

to the United States Court of Appeals for the Fifth Circuit.

On May 28, 1975 this Honorable Court granted a 15-day extension of time, until and including June 20, 1975 within which Petitioner's Brief must be filed.

WHETHER THE TRIAL COURT'S ORDER PROHIBITING DEFENDANT GEDERS AND HIS ATTORNEY FROM CONFERRING WITH EACH OTHER DURING A SIXTEEN HOUR PERIOD AT A CRUCIAL STAGE OF THE TRIAL DEPRIVED DEFENDANT GEDERS OF HIS SIXTH AMENDMENT RIGHT TO COUNSEL?

Argument

It would appear the trial court fully apprehended the import of its Order to Defendant Geders *prohibiting his contact with or access to his attorney during a sixteen hour recess overnight between direct and cross examination of Geders.* It should be well noted that while the impression was created by the Government, in its Brief on appeal to the Fifth Circuit, that Geders was only ordered by Judge Krentzman to not consult with his attorney regarding his testimony, IN FACT, the trial judge ordered Defendant Geders and his counsel to remain TOTALLY INCOMMUNICADO to one another for a sixteen hour period during a critical stage of the trial. (The recess came during Defendant Geders' testimony, the last scheduled witness during the trial before the Government decided to offer rebuttal evidence by reason of Geders' testimony.)

The repressive tone for the incommunicado order sought by Prosecutor Blasingame should be carefully considered (T-1149):

MR. BLASINGAME:

> "Has this witness been instructed now that he is not to talk to anyone whatsoever, including his attorney–or anyone– about this case at all?"

The unmistakable tone and length and width and height and depth of the trial judge's order to Defendant Geders, *in response to the prosecutor's request*, placing Geders and his counsel totally incommunicado for a 16-hour period should be well noted (T-1153):

THE COURT:

> "Well, I don't have any questions, Mr. Rinehart (Geders' counsel), about what you–I think you are a disciplined man. I think you are trained in the law . . . but your client, as far as I know, has not had any legal training . . . and I don't know that he is subject to that same instruction–that he would understand it.
>
> *I think he would understand it if I told him just not to talk to you; and I just think that it is better that he not talk to you about anything.*" (emphasis added)

Finally, the trial court's question to counsel for Defendant Geders on the following morning (when the trial resumed) should be carefully noted in determining Judge Krentzman's intent regarding his all encompassing order to Defendant Geders (T-1164):

THE COURT:

> "You (Rinehart) have not talked with him (the Defendant Geders) of course, have you?"

MR. RINEHART:

> "No, I haven't."

The Fifth Circuit (along with all other Circuits except the Second and Third) had apparently not

previously addressed itself to this particular constitutional question and was forced to align itself with either the Second or Third Circuit, which Circuits held virtually opposite decisions and rationales on the question, to wit:

The Third Circuit held in *United States of America v. Venuto*, 182 F.2d 519 (3rd Cir. 1950) as follows at page 522:

> " . . . To deprive an accused defendant and his counsel of the right to consult with each other during an eighteen hour court recess was most certainly deprivation of the defendant's constitutional right to consult counsel at all stages of the proceeding. We can find no justification for imposing a restriction of silence between the accused and counsel during a trial recess. We reject the Government's contention that the defendant and his counsel must prove affirmatively the exact prejudice produced by this injunction in a Federal prosecution. Not only would this require them to disclose what would have been privileged communication between attorney and client, but, as stated in Glasser v. United States, supra, 315 U.S. at page 467:
>
> 'The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.'
>
> By restricting the right of consultation between this Defendant and his counsel during court recess, Defendant was denied the right to have the assistance of counsel for his defense, as guaranteed by the Sixth Amendment to the Constitution. His objection on this ground and his motion for mis-trial directed to the trial court were well founded. Accordingly, the conviction must be reversed and a new trial granted."

In contrast, the Second Circuit held in *United States of America v. Leighton*, 386 F.2d 822 (2nd Cir. 1967) as follows at page 823:

> "Leighton's objection to the ruling of the trial court that he could not consult with his attorney during the luncheon recess is framed in terms of the violation of his right to counsel. But Leighton was represented by retained counsel during the entire trial. What is actually at issue is the question of the effective assistance of counsel. At no time during, before, or after the recess, did either Leighton or his attorney indicate that they did in fact have something to discuss which might have affected Leighton's testimony or course of action. Leighton's attorney did object to the judge's ruling, but the objection appears to us an attempt to sow reversible error into the record, rather than an effort to indicate to the trial judge that the attorney and client had something to discuss. Compare Krull v. United States, 240 F.2d 122 (5 Cir.), cert denied 353 U.S. 915, 77 S.Ct. 764, 1 L. Ed. 2d 668 (1957). We conclude that the Government has established beyond a reasonable doubt that the appellant's right to the effective assistance of counsel was not impaired by the ruling of the trial court. See Chapman v. State of California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).
>
> "Leighton's reliance upon *United States v. Venuto*, 182 F.2d 519 (3 Cir. 1950), is misplaced. That case involved a series of rulings barring communication between a defendant and his attorney in a four-day bank deposit reconstruction income tax trial involving voluminous records. The harm done by the ruling in those circumstances is self-evident. In the case before us, only one eighty-five minute luncheon recess is involved. The ruling in the instant case barring communication between the

> defendant and his counsel during the recess between direct and cross examination was also applied to every other witness who testified at the trial. The application of this ruling to others than the defendant is not in issue. Its application to the defendant was quite plainly uncalled for, and we are unable to understand why it was sought or made as to him. We will not, however, reverse the conviction solely on this ground when we can discern no actual harm to the right to effective assistance of counsel, and are convinced that there was none."

The Fifth Circuit in the case sub judice, after examining both in its opinion, rejected the law and rationale of *Venuto, supra* in favor of the law and rationale of *Leighton, supra*, stating at page 272 and 273 of its opinion:

> "The United States Court of Appeals for the Second Circuit has more recently faced an identical fact situation, however, and it has required the defendant to make some showing of prejudice before the error of the trial court in forbidding lawyer/client consultation for some limited period rises to the status of reversible error . . . "
>
> " . . . Because, like the Second Circuit, we can discern no actual harm . . . and are convinced that there was none, we must reject appellant's contention that defendant Geders' deprivation of the assistance of counsel constitutes reversible error."

The Fifth Circuit thus aligned itself with the Second Circuit, notwithstanding two United States Supreme Court cases, whose rationales can reasonably be interpreted to include the rule of law that denial to a Defendant of access to counsel during a crucial state of

his criminal trial proceeding is, *per se*, reversible error; i.e., that the denial is deprivation of the defendant's right to assistance of counsel in his defense, as guaranteed by the Sixth Amendment to the United States Constitution. The rationales of these cases is the denial is such a fundamental deprivation of a Federal constitutional right as to not require any showing of prejudice or "actual harm," to wit:

Glasser v. United States, 315 U.S. 60, 62 S. Ct. 457 at page 467:

> " . . . To determine the precise degree of prejudice sustained by Glasser as a result of the Court's appointment of Stewart as counsel for Kretske is at once difficult and unnecessary. *The right to have the assistance of counsel is too fundamental and absolute to allow Courts to indulge in nice calculations as to the amount of prejudice arising from its denial.*" (emphasis added)

Earlier in the opinion at page 467, the Supreme Court stated:

> "There is yet another consideration. Glasser *wished the benefit of the undivided assistance of counsel* of his own choice. We think that such a desire on the part of an accused should be respected. . . ." (emphasis added)

Some Thoughts on *Venuto* and *Leighton*

The factual situation in *Venuto, supra*, was strikingly similar to the factual situation in the instant case regarding the incommunicado orders by the respective trial judges; in the former for an 18-hour overnight recess between direct and cross examination of the Defendant and in the instant case for a 16-hour overnight recess between direct and cross examination of the Defendant. In *Venuto* the trial judge stated at page 521:

> "I would like to say to counsel, I do not want to keep this man in custody overnight–he is now committed for cross-examination so *he will not discuss this case with anybody*. Otherwise, I will have to commit him." (emphasis added)

The opinion continues to state at page 521:

> "In the ensuing discussion, similar and more explicit directions were given by the trial judge to the effect that Defendant and his counsel were required to bind themselves not to consult together during this eighteen hour overnight recess at this crucial point of the trial or the court would revoke Defendant's bail and commit him to jail incommunicado so that no consultation would be possible."

It will be recalled that in the instant case the trial judge instructed Defendant Geders (T-1153):

> " . . . I think he (the Defendant) would understand ti [sic] if I told him just not to talk to you (counsel); and I just that it is better that *he not talk to you about anything*." (emphasis added)

The intention of these orders is plainly more than restricting the Defendant and his attorney from talking about testimony offered by the Defendant on direct examination or to be offered on cross-examination to the questions of presecution. The intentions of the trial judges were rather to lower thick impenetrable veils of silence between the Defendants and their attorneys for 18 and 16 hours, respectively, regarding all aspects of the trial proceedings, past, present and future; i.e., they were incommunicado orders absolutely barring consultation between Defendants and their attorneys during critical stages of their trial proceedings.

In contrast, in *Leighton* the appellate court was only considering an incommunicado order imposed by the trial judge between direct and cross examination of the Defendant during a luncheon recess covering less than an hour and a half. Even though the Second District conceded that the incommunicado order imposed on Defendant Leighton was "quite plainly uncalled for, and we are unable to understand why it was sought or made as to him," (p. 823), still that appellate court apparently "indulged in nice calculations as to the amount of prejudice arising from its denial" (right to counsel), and found no prejudice or "actual harm" to Defendant's right to assistance of counsel in his defense. In considering what is actually at issue, as stated by the Second District in *Leighton* at page 823, the question of the "effective assistance of counsel," one wonders how this appellate court would rule on the instant trial court's incommunicado order that imposed a heavy veil of silence between the Defendant and his counsel during an overnight recess of SIXTEEN HOURS, *regarding all matters at trial?* It is conceivable that even this appellate court, while "indulging in nice calculations as to the amount of prejudice arising from its denial," may very well have long pondered and even found a denial of "effective assistance of counsel" in the trial proceeding and further found that the Defendant suffered prejudice and "actual harm" without any "affirmative showing" of same.

Several Other Observations

There is room for meaningful speculation as to why any trial judge would impose an across-the-board

incommunicado order of 16 hours duration upon the sole testifying Defendant and his attorney in the recess between his direct and cross-examination testimony. Why, for example, didn't the trial judge only limit the incommunicado order to no discussion regarding the Defendant's testimony? Would not an admonition to the Defendant and his counsel to not discuss Defendant's testimony be just as effective as limiting or admonitory orders and instructions freely given by the Court to other witnesses and the jury regarding matters of law and fact at other recesses or interruptions during the course of the trial?

There was, of course, no counterpart admonition against the prosecuting attorneys continuing on at full speed overnight in preparing the Government's cross-examination of Geders, including consultation with the case agent who was present during the direct examination of the Defendant, preparing argument against Defendant's predictable motion for judgment of acquittal following Geders' testimony (Geders was the last witness scheduled to testify before the Government decided to offer rebuttal testimony by reason of Geders' testimony), etc.

Moreover it should not be overlooked that the "problem" of Defendant's communication with his counsel during the 16-hour recess arose by reason of the *prosecution's request* for the recess between direct and cross examination and the *prosecution's request* for the total incommunicado order to be placed heavily upon Defendant Geders and his attorney.

The ultimate issue before this Honorable Court is whether the trial judge *per se* denied to Defendant Geders in the instant criminal proceeding his Sixth Amendment right to assistance of counsel when he ordered the Defendant and his counsel to remain totally

incommunicado for a 16-hour period of time at a crucial stage of his trial or whether the Defendant must affirmatively establish prejudice or "actual harm" arising from the veil of silence imposed by the trial court between a Defendant and his attorney during the trial proceeding?

It is the contention of Petitioner Geders that, as stated in *Venuto, supra:*

> "We reject the Government contention that Defendant and his counsel must prove affirmatively the exact prejudice produced by this injunction in a federal prosecution. Not only would this require them to disclose what would have been privileged communication between attorney and client but, as stated in Glasser v. United States, Supra, 315 U.S. at page 76, 62 S.Ct. at page 467: "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." By restricting the right of consultation between the Defendant and his counsel during court recesses Defendant was denied the right to have the assistance of counsel for his defense, as guaranteed by the Sixth Amendment to the U.S. Constitution. . ."

Conclusion and Prayer

For the reasons hereinbefore cited, Petitioner, John A. Geders, respectfully prays that this Honorable Court resolve the conflict now existing between the United States Court of Appeals for the Second and Third Circuits on the question presented in this cause for review by adopting the law and rationale of the Third Circuit; and further, respectfully prays that this Honorable Court reverse the Judgment of Convictions

entered against him in United States District Court, Middle District of Florida, Tampa Division, as affirmed by the United States Court of Appeals for the Fifth Circuit; and, in the alternative, to reverse and remand for new trial as to Petitioner, John A. Geders.

Respectfully Submitted,

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